

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KORY T. O'BRIEN,

Plaintiff,

v.

R. GARZA, *et al.*,

Defendants.

Case No. 2:22-cv-01730-TLN-JDP (PC)

ORDER

GRANTING PLAINTIFF'S MOTION TO
AMEND AND DENYING PLAINTIFF'S
MOTIONS FOR EXTENSION OF TIME, TO
STAY RESPONSE, AND TO STAY
DISCOVERY

ECF Nos. 24, 31, 33, & 37

SCREENING ORDER FINDING THAT
PLAINTIFF'S FIRST AMENDED
COMPLAINT STATES COGNIZABLE FIRST
AMENDMENT, EIGHTH AMENDMENT,
AND STATE LAW TORT CLAIMS
AGAINST DEFENDANTS GARZA AND
BAKER

ECF No. 25

FINDINGS AND RECOMMENDATIONS

THAT PLAINTIFF'S CLAIMS FOR
FAILURE TO PREVENT FUTURE HARM,
FAILURE TO INTERVENE, AND AGAINST
THE CDCR BE DISMISSED

DEFENDANTS' MOTION FOR PARTIAL
SUMMARY JUDGMENT BE DENIED
WITHOUT PREJUDICE AS MOOT

ECF Nos. 25 & 28

1 Plaintiff brought this action on September 30, 2022, and, on November 14, 2022, I found
 2 that the complaint stated both a cognizable First Amendment claim against defendant Garza and
 3 viable Eighth Amendment claims against defendants Garza and Baker.¹ ECF No. 9. Plaintiff
 4 alleged that Garza told him he did not care about him because of grievances he had filed. *Id.* at 2.
 5 Shortly thereafter, plaintiff began to experience chest pains and called for help. *Id.* Defendants
 6 Garza and Baker, against whom the grievances had been filed, allegedly ignored plaintiff's calls
 7 for help for a time and delayed getting him medical help. *Id.*

8 After screening, the parties conducted discovery, which included defendants' deposition
 9 of plaintiff. ECF No. 30-1 at 2. On June 28, 2023, defendants moved to file an early motion for
 10 partial summary judgment, ECF No. 20, and I granted their request on August 11, 2023, ECF No.
 11 23.

12 I. Plaintiff's Motion to Amend

13 On August 17, 2023, plaintiff filed a motion to amend his complaint, seeking to add
 14 claims for failure to summon medical care, failure to prevent future harm, failure to intervene or
 15 intercede, failure to protect, and a state tort claim. ECF No. 24 at 1. He also seeks to add the
 16 California Department of Corrections and Rehabilitation ("CDCR") as a defendant. *Id.*
 17 Defendants have opposed amendment, ECF No. 30, and plaintiff has filed a delayed reply, ECF
 18 No. 38. After reviewing the pleadings, I will grant his motion to amend.

19 Rule 15(a)(2) directs that a court "should freely give leave [to amend a complaint] when
 20 justice so requires." Courts should generally be liberal in allowing a party to amend. *Sonoma*
 21 *Cnty. Ass'n of Retired Emples. v. Sonoma Cnty.*, 708 F.3d 1109, 1117 (9th Cir. 2013). Leave to
 22 amend should be denied only where there is strong evidence of "undue delay, bad faith or dilatory
 23 motive on the part of the movant, repeated failure to cure deficiencies by amendments previously
 24 allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or]
 25 futility of amendment" *Id.* (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)) (alteration
 26 in original). Of these elements, the prejudice to the opposing parties is assigned the greatest

27 ¹ This defendant is identified as "Portee" on the docket. I will direct the Clerk of Court to
 28 alter the docket to reflect the correct name.

1 weight. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

2 There is no undue delay here. The scheduling order provides that the deadline for
3 amending plaintiff's complaint is September 1, 2023. ECF No. 19 at 5. He filed his motion to
4 amend on August 17, 2023. ECF No. 24. Defendants question the timing of plaintiff's motion to
5 amend, insofar as it was filed after they were given permission to file an early motion for partial
6 summary judgment. Their concerns are not wholly without merit, but I note that, thus far,
7 plaintiff has not abused the amendment process and that leave to amend must be freely given.

8 Defendants also argue that allowing plaintiff to amend his complaint at this time would
9 prejudice them. The parties have already conducted some written discovery, and plaintiff has
10 been deposed. Nevertheless, discovery remained open when plaintiff moved to amend and there
11 is no indication that expansion of the discovery deadline will be overly prejudicial. And while
12 defendants will, if they so choose, be required to refile their motion for partial summary judgment
13 in light of the new complaint, that seems no great undertaking. The claims, as discussed in the
14 screening section to follow, will remain largely unchanged and I am recommending against the
15 addition of a new defendant.

16 Next, defendants argue that the claims plaintiff seeks to add are futile. I will discuss the
17 futility of most of the claims in the screening section to follow, but plaintiff's state law tort claims
18 are, for screening purposes, suitable to proceed. Thus, the amended complaint is not wholly
19 futile.

20 The fifth and final factor, that plaintiff has not previously amended his complaint, also
21 favors plaintiff. Thus, I will grant plaintiff's motion to amend.

22 II. Screening Order

23 After granting leave to amend, I must screen plaintiff's amended complaint. A federal
24 court must screen a prisoner's complaint that seeks relief against a governmental entity, officer,
25 or employee. *See* 28 U.S.C. § 1915A(a). The court must identify any cognizable claims and
26 dismiss any portion of the complaint that is frivolous or malicious, fails to state a claim upon
27 which relief may be granted, or seeks monetary relief from a defendant who is immune from such
28 relief. *See* 28 U.S.C. §§ 1915A(b)(1), (2).

1 A complaint must contain a short and plain statement that plaintiff is entitled to relief,
 2 Fed. R. Civ. P. 8(a)(2), and provide “enough facts to state a claim to relief that is plausible on its
 3 face,” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The plausibility standard does not
 4 require detailed allegations, but legal conclusions do not suffice. *See Ashcroft v. Iqbal*, 556 U.S.
 5 662, 678 (2009). If the allegations “do not permit the court to infer more than the mere
 6 possibility of misconduct,” the complaint states no claim. *Id.* at 679. The complaint need not
 7 identify “a precise legal theory.” *Kobold v. Good Samaritan Reg’l Med. Ctr.*, 832 F.3d 1024,
 8 1038 (9th Cir. 2016). Instead, what plaintiff must state is a “claim”—a set of “allegations that
 9 give rise to an enforceable right to relief.” *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1264
 10 n.2 (9th Cir. 2006) (en banc) (citations omitted).

11 The court must construe a pro se litigant’s complaint liberally. *See Haines v. Kerner*, 404
 12 U.S. 519, 520 (1972) (per curiam). The court may dismiss a pro se litigant’s complaint “if it
 13 appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which
 14 would entitle him to relief.” *Hayes v. Idaho Corr. Ctr.*, 849 F.3d 1204, 1208 (9th Cir. 2017).
 15 However, “‘a liberal interpretation of a civil rights complaint may not supply essential elements
 16 of the claim that were not initially pled.’” *Bruns v. Nat’l Credit Union Admin.*, 122 F.3d 1251,
 17 1257 (9th Cir. 1997) (quoting *Ivey v. Bd. of Regents*, 673 F.2d 266, 268 (9th Cir. 1982)).

18 As noted above, plaintiff seeks to add new claims for failure to summon medical
 19 assistance, failure to prevent harm, and failure to protect. *Id.* All of these claims are effectively
 20 subsumed in the Eighth Amendment claims against Garza and Baker that I already found viable.
 21 ECF No. 9 at 2-3 (finding actionable Eight Amendment claims against both defendants for failure
 22 to summon medical help sooner).

23 Plaintiff’s failure-to-intervene claim, predicated on Baker standing behind Garza, is also
 24 non-viable. As defendants point out, a claim against Garza for failure to intervene in his own
 25 conduct is non-cognizable. *See Cepero v. Gillespie*, No. 2:11-cv-01421, 2020 U.S. Dist. LEXIS
 26 195374, *22 n.98 (D. Nev. Oct. 21, 2020) (“Cepero does not and cannot allege a claim for failure
 27 to intervene against Bonkavich because Bonkavich could not intervene in his own conduct and
 28 would simply be liable under a different theory. So this claim cannot proceed against him.”).

1 And plaintiff's allegation that Baker stood behind Garza while he told both officers about his
2 medical issues does not create a separate failure-to-intervene claim; it is merely a restatement of
3 the claim that both officers failed to timely summon medical care. Indeed, "intervention" in this
4 instance would have amounted to nothing more than calling medical aid—the alleged omission at
5 issue in the operative Eighth Amendment claim against Baker.

6 Finally, CDCR, which plaintiff is suing under a theory of *respondeat superior*, is not an
7 appropriate defendant. Plaintiff appears to be seeking only compensatory damages, and CDCR, a
8 state agency, has immunity from such damages under the Eleventh Amendment. *Cf. Taylor v.*
9 *List*, 880 F.2d 1040, 1045 (9th Cir. 1989) ("The Nevada Department of Prisons, as a state agency,
10 clearly was immune from suit under the Eleventh Amendment.").

11 By contrast, the original First Amendment retaliation and Eighth Amendment deliberate
12 indifference claims remain viable. Additionally, the amended complaint adds viable state law tort
13 claims against both defendants Garza and Baker. ECF No. 25 at 14. These claims will proceed,
14 and I will recommend all other claims be dismissed.

15 III. Remaining Pending Motions

16 Given that I am allowing plaintiff to amend his complaint, I will recommend that
17 defendants' motion for partial summary judgment be denied as moot, without prejudice. ECF No.
18 28. Defendants may refile it within the dispositive motion deadline with any modifications they
19 deem necessary. Denial of this motion moots plaintiff's requests for additional time to file a
20 response, ECF No. 31, and motion to stay response, ECF No. 37. Finally, I will deny plaintiff's
21 motion to stay discovery insofar as it is predicated on resolution of the motion for partial
22 summary judgment. ECF No. 33. The scheduling order will require modification, but that will
23 issue by separate order.

24 Accordingly, it is ORDERED that:

25 1. Plaintiff's motion to amend, ECF No. 24, is GRANTED, and this action shall proceed
26 on plaintiff's first amended complaint, ECF No. 25.

27 2. The first amended complaint, for screening purposes, states viable First Amendment
28 Retaliation, Eighth Amendment deliberate indifference for failure to summon medical care, and

1 state law tort claims against both defendants Garza and Baker.

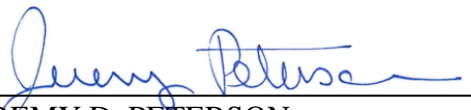
2 3. Plaintiff's motions for extension of time, ECF No. 31, stay discovery, ECF No. 33,
3 and to stay response, ECF No. 37, are DENIED.

4 Further, it is RECOMMENDED that defendants' motion for partial summary judgment,
5 ECF No. 28, be DENIED without prejudice to refiling.

6 These findings and recommendations are submitted to the United States District Judge
7 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
8 after being served with these findings and recommendations, any party may file written
9 objections with the court and serve a copy on all parties. Such a document should be captioned
10 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
11 objections shall be served and filed within fourteen days after service of the objections. The
12 parties are advised that failure to file objections within the specified time may waive the right to
13 appeal the District Court's order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez*
14 *v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

15
16 IT IS SO ORDERED.

17 Dated: January 17, 2024

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19 JEREMY D. PETERSON
20 UNITED STATES MAGISTRATE JUDGE
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